Wananchi Group (K) Limited v Commissioner of Customs & Border Control (Tribunal Appeal 210 of 2022) [2023] KETAT 125 (KLR) (Civ) (17 March 2023) (Judgment)

Neutral citation: [2023] KETAT 125 (KLR)

REPUBLIC OF KENYA

IN THE TAX APPEAL TRIBUNAL

CIVIL

TRIBUNAL APPEAL 210 OF 2022

E.N WAFULA, CHAIR, CYNTHIA B. MAYAKA, GRACE MUKUHA, JEPHTHAH NJAGI & AK KIPROTICH, MEMBERS

MARCH 17, 2023

BETWEEN

WANANCHI GROUP (K) LIMITED ..... APPELLANT

AND

COMMISSIONER OF CUSTOMS & BORDER CONTROL ..... RESPONDENT

JUDGMENT

Background

1. The Appellant is a limited liability company incorporated in Kenya. The Appellant's principal activity is provision of cable television and internet services as well as providing triple play services to its customers.

2. The Respondent is a principal officer appointed under and in accordance with Section 13 of the *Kenya Revenue Authority Act*, and the Kenya Revenue Authority is charged with the responsibility of among others, assessment, collection, accounting and the general administration of tax revenue on behalf of the Government of Kenya.

3. On July 16, 2019, the Respondent issued the Appellant with a letter indicating its notice of intention to conduct a Post Clearance Audit (PCA) on the Appellant's imports and exports for the period 2014 to 2018.

4. The Appellant provided the requested information. The Respondent vide a letter dated November 29, 2019, issued a demand for the payment of Kshs 60,945,649.00.

5. Aggrieved by the demand, the Appellant lodged an application for review vide a letter dated December 16, 2019.

6. The Respondent and the Appellant held a consultative meeting on January 15, 2020 after which the Respondent through a letter dated January 17, 2020 sought additional information from the Appellant which was provided through a letter dated February 14, 2020.

7. The Respondent vide a letter dated 1March 3, 2020 responded to the Appellant's letter of February 14, 2020 informing the Appellant that it was in the process of reviewing the information provided.

8. The Respondent vide a letter dated October 15, 2020 issued a review decision in response to the Appellant's application dated December 16, 2019. In the decision, the Respondent revised the demand from Kshs 60,945,649.00 to Kshs 43,145,660.00.

9. The parties held consultative meetings on December 14, 2020 and January 15, 2021. However, the parties failed to reach an agreement resulting in the Respondent, through a letter dated January 22, 2021, confirming the position in the review decision dated October 15, 2020. The Respondent then made a demand of Kshs 46,428,080.00.

10. The Appellant made an application for review of the Respondent's decision vide a letter dated February 11, 2021.

11. The Respondent responded to the application for review vide a letter dated March 10, 2021 confirming its decision on the matter.

12. The Appellant being dissatisfied with the Respondent's decision dated March 10, 2021 filed an appeal with the Tribunal as TAT No. 147 of 2021. The Tribunal issued its final decision in a judgment delivered on December 15, 2021.

13. Through a letter dated 1January 4, 2022, the Respondent issued the Appellant with a letter titled "Re: Demand Notice of Kshs 46,428,080.00" which was said to be in reference to the Appellant's application for review dated February 11, 2021.

14. That letter dated January 14, 2022 is the genesis of this Appeal. The Appellant lodged a Notice of Appeal dated and filed on the February 14, 2022.

The Appeal

15. The Appeal is premised on the following two grounds stated in the Memorandum of Appeal dated February 28, 2022 and filed on March 1, 2022:-

    a. The Respondent erred in law and fact by uplifting the prices of imported modems and STBs contrary to the provisions of Section 122 as read together with the Fourth Schedule to the *East Africa Community Customs and Management Act, 2004* (the EACCMA).

    b. The Respondent erred in law and in fact by failing to consider the additional information and documents provided by the Appellant in reviewing the Appellant's application for review dated February 11, 2021.

Appellant's Case

16. The Appellant's case is premised on the Appellant's Statement of Facts dated 28th day of February, 2022 and filed on March 1, 2022 together with the documents attached thereto and the written submissions dated July 4, 2022 and filed on July 21, 2022 together with the legal authorities filed therewith.

17. That between the periods January 2017 to April 2018 the Appellant imported new STBs and modems. However, due to the high cost of customer acquisition, the Appellant resolved to import factory

refurbished STBs and modems. That this was on the basis that the refurbished factory STBs and modems were priced at a lower price as compared with the new STBs and modems as the Appellant subsidized the cost of the equipment to its customers. The objective of this decision was to provide affordable services to the market and to grow its market share.

18. That the decision by the Appellant to purchase refurbished STBs and modems as opposed to new STBs and modems had the following price implications:

    a. The cost of a new STB was USD 28 per kit while the unit price for a refurbished STB was USD 17 per kit; and

    b. The cost of a new modem was USD 40.5 per kit while the unit price for a refurbished modem was USD 17 per unit.

19. That on 16 July, 2019, the Respondent issued the Appellant with a letter indicating its notice of intention to conduct a Post Clearance Audit on the Appellant's imports and exports for the period 2014 to 2018. That the letter outlined various information and documents that the Respondent required in order to conduct the PCA.

20. That the Appellant provided the requested information during a field visit by the Respondent's team to the Appellant's offices. That subsequently, the Respondent through a letter dated 29 November 2019, issued a demand for the payment of Kshs 60,945,649.00 as outlined below:

Description	**Amount** (KES)
Import Duty	3,557,200
Value Added Tax	46,827,707
Import Declaration Fee	5,164,627
Railway Development Levy	5,396,115
Total	60,945,649

21. That the Respondent in issuing the demand did the following:

    a. Uplifted the unit price of STBs to USD 28 per kit from the declared value of USD 17 per kit for the year 2018 resulting in an additional amount of Kshs 13,689,836.00.

    b. Uplifted the unit price of the STBs to USD 28 per kit from the declared value of USD 17 per kit for the year 2019 resulting in an additional amount of Kshs 3,887,862.00.

    c. Uplifted the unit price of Technicolor modems to USD 40.5 per modem from the declared value of USD 17 for the year 2018 resulting in an additional amount of Kshs 18,998,239.00.

    d. Uplifted the unit price of Technicolor modems to USD 40.5 per modem from the declared value of USD 17 for the year 2019 resulting in an additional amount of Kshs 5,540,521.00 and

    e. Assessed import duty on undeclared sales from Shenzen Skyworth Digital Technologies (Shenzen) and Optiwella KFT (Optiwella) to Kshs 11,561,444.

22. Aggrieved by the demand the Appellant lodged an application for review vide a letter dated December 16, 2019.

23. That thereafter the Respondent and the Appellant held a consultative meeting on January 15, 2020 after which the Respondent through a letter dated January 17, 2020 sought additional information from the Appellant. That the Appellant provided the additional information vide a letter dated February 14, 2020.

24. That the Respondent vide a letter dated March 13, 2020 replied to the Appellant's letter of February 14, 2020 informing the Appellant that it was in the process of reviewing the information provided.

25. That the Respondent vide a letter dated October 15, 2020 issued a review decision in response to the Appellant's application for review dated December 16, 2019. In the said review decision, the Respondent revised the demand from Kshs 60,945,649.00 to Kshs 43,145,660.00. The basis for revised demand was that:

    a. The 2017 assessment of Kshs 6,238,545.00 related to a period where the Appellant had been audited by the Respondent and the Respondent therefore dropped the assessment for 2017: and

    b. The Appellant had been able to demonstrate through matching of invoices, items paid for in the remittance advices and their corresponding customs entries and thus they had dropped a demand of Kshs 11,561,444.00.

26. That the Respondent's review decision was issued approximately eight (8) months after additional information in respect of the application for review was provided. This was therefore outside the timelines set out under Section 229 of the East Africa Community Customs Management Act, 2004 (EACCMA).

27. That based on the desire to be tax compliant, the Appellant, upon receipt of the Respondent's review decision, sought to amicably engage the Respondent in a bid to demonstrate to the Respondent that there was no under-declaration. In this regard, the Appellant vide a letter dated November 13, 2020 made a request to amicably engage the Respondent.

28. The parties held consultative meetings on 14th December, 2020 and January 15, 2021. However, the parties failed to reach an agreement resulting in the Respondent, through a letter dated 22nd January, 2021, confirming the position in the review decision dated 15th October, 2020. That the Respondent then made a demand of Kshs 46,428,080.00.

29. That the Appellant being aggrieved by the tax demand, subsequently made an application for review of the Respondent's decision vide a letter dated February 11, 2021. The grounds for the application for review were as follows:

    a. That the Respondent's review decision dated October 15, 2020 was issued out of time and thus the Appellant's application for review dated December 16, 2019 is deemed to have been allowed by operation of the law;

    b. That the modems and STBs imported by the Appellant during the period August, 2017 to August 2019 were refurbished. The Appellant in seeking the review relied on the suppliers' confirmations to the Respondent confirming that the modems and STBs were refurbished; and

c. That price uplift on the imported STBs and modems by the Respondent is erroneous to the extent that it disregarded the actual price paid by the Appellant to the suppliers upon importation.

1. That the Respondent replied to the application for review vide a letter dated March 10, 2021. In its decision, the Respondent reiterated that the PCA and correspondence with the Appellant were conducted within the law and hence the tax demanded was still due and payable and thus the Appellant was required to make the payments to avoid accumulation of interest and possible enforcement actions.

2. That the Appellant being dissatisfied with the Respondent's decision dated March 10, 2021 notified the Tribunal of its intention to appeal against the said decision vide a Notice of Appeal dated March 15, 2021.

3. That subsequently, the Appellant filed with the Tribunal the Memorandum of Appeal and Statement of Facts on March 29, 2021. The Appellant's appeal was premised on the following grounds:

    a. That the Respondent's decision dated March 10, 2021 is not a valid review decision as provided for under Section 229 (4) of the *EACCMA*;

    b. That the Appellant's application for review dated December 16, 2019 be allowed by operation of the law as provided for under Section 229(5) of the *EACCMA*; and

    c. That the Respondent erred in law and fact by uplifting the prices of imported modems and STBs contrary to the provisions of Section 122 as read together with the Fourth Schedule to the *EACCMA*.

1. That the Tribunal subsequently directed the parties to submit their respective written submissions in the matter which was referenced as TAT No. 147 of 2021. The Tribunal considered both parties' arguments and issued its final decision in a judgment delivered on December 15, 2021.

2. That the Tribunal in its judgment considered one (1) issue for determination which was "Whether the Appellant's application for review dated 16 December 2019 was deemed allowed by operation of the law."

3. In arriving at its final judgment, the Tribunal held that:

    a. The Respondent's letter dated January 17, 2020 cannot constitute a review decision under the provisions of Section 229 of the *EACCMA* as it was a request for additional documents; and

    b. The Appellant's application for review dated 16th December, 2019 should not be allowed by operation of the law under Section 229(5) of the *EACCMA* after the lapse of thirty (30) days since the Appellant failed to write to the Respondent at the expiry of this period informing the Respondent that its application was allowed by operation of the law.

1. To this end, the Tribunal made the following Orders:

a. That the Respondent do consider the Appellant's review application dated 11th February, 2021 and issue a review decision within thirty(30) days from the date of the judgment;

b. In default of compliance with the above order, the Appellant's review application shall be deemed to be allowed; and

c. Each party to bear its costs.

37. That vide a letter dated January 14, 2022, the Respondent issued the Appellant with a letter titled "Re: Demand Notice of Kshs 46,428,080.00" which was said to be in reference to the Appellant's application for review dated February 11, 2021. In the letter, the Respondent stated that:

a. The Respondent's decision in the letter dated January 22, 2021, which confirmed the demand notice of Kshs 46,428,080.00 inclusive of penalties and interest, was valid and payable as the review decision dated October 15, 2020 upon which the demand is premised was issued within time.

b. According to the Respondent, the review decision was issued on January 17, 2020 and the letter dated October 15, 2020 was mere feedback to the Appellant's application for review dated February 14, 2020;

c. On the issue of whether the modems were new or refurbished, the Respondent stated that during the correspondences with the Appellant, the only agreement provided was the Master Supply and Support Agreement between the Appellant and Shenzen which did not indicate the condition of the products.

d. The Respondent was not in receipt of letters from Optiwella and Shenzen and that the letter from Shenzen referred to by the Appellant was not addressed to the Respondent. Therefore, it was merely a statement. The Respondent was also not in receipt of the letter from Optiwella dated July 10, 2018;

e. Valuation of goods is guided by Section 122 and the Fourth Schedule to the *EACCMA*. The Respondent's uplift of the values was guided by the following:

i. There was a misdeclaration of goods putting the application of transaction value in doubt;

ii. The Respondent doubted the transaction value based on previous identical imports from the importer; and

iii. The Appellant could not explain the reason for the change in transaction value except the claim that the goods were refurbished to which there was no evidence to that effect.

a. From the above, the Respondent still held the view that the assessed value of USD 28/ STB and USD 40.5/modem is valid and that the assessed demand amount of Kshs 46,428,080.00 is due and payable to the Respondent immediately to avoid further accrual of interest.

1. That being dissatisfied with the Respondent's decision, the Appellant decided to lodge an appeal with the Tribunal through a Notice of Appeal dated February 14, 2022.

2. That pursuant to the Notice of Appeal referred to above, the Appellant hereby appeals the entire decision dated February 14, 2022 under Section 230 of the *EACCMA*. The

Appellant sets out its facts in support of its detailed grounds of appeal to the review decision as follows:

a. The price uplift on the imported STBs and modems by the Respondent is contrary to Section 122 of the *EACCMA* as read together with the Fourth Schedule

3. The Appellant avers that the Respondent in uplifting the customs values for the imported modems and STBs has acted in breach of the mandatory statutory regime and parameters for the determination of the value and assessment of import duty as provided for under Section 122(1) of the *EACCMA* as read together with the Fourth Schedule to the *EACCMA*.

4. That Section 122 of the *EACCMA* provides that, "Where imported goods are liable to import duty ad valorem, then the value of such goods shall be

determined in accordance with the Fourth Schedule and import duty shall be paid on that value."

42. That Paragraph 2(1) of the Fourth Schedule to the *EACCMA* provides that,

> "The customs value of imported goods shall be the transaction value, which is the price actually paid or payable for the goods when sold for export to the Partner State..."

43. That the Appellant avers that it procured refurbished STBs and modems at the cost USD 17 per kit and USD 17 per unit respectively and that this is the price that was actually paid for these items. Therefore, the Appellant affirms that this was the correct value of the goods pursuant to the earlier mentioned Paragraph 2 (1) of the Fourth Schedule.

44. That further, the Appellant avers that it fulfilled all the conditions for the application of the transaction value as set out under Paragraph 2(1) to the Fourth Schedule to the *EACCMA*. Specifically, Paragraph 2(1) of the Fourth Schedule to the *EACCMA* provides for the following conditions which must be fulfilled in application of the transaction value as the valuation method:

a. That there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which are imposed or required by law or by the public authorities in the partner state, limit the geographical area in which the goods may be resold; or do not substantially affect the value of the goods;

b. That the sale or price is not subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued;

c. That no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made; and

d. That the buyer and the seller are not related, or where the buyer and seller are related, the transaction value is acceptable for customs purposes.

45. That the Appellant therefore avers that it imported refurbished STBs and modems which were at a lower purchase price than new STBs and modems. The Appellant avers that the Respondent has, in uplifting the customs value, failed to have regard to the price actually paid as demonstrated by the commercial invoices and purchase orders availed which reflected the commercial agreements between the Appellant and the suppliers of the refurbished STBs and modems.

46. The Appellant asserted that the wording of Section 122(1) as read together with Paragraph 2(1) of the Fourth Schedule to the *EACCMA* is couched in mandatory terms and the Respondent therefore acted contrary to the provisions of Section 122 as read together with Paragraph 2(1) of the Fourth Schedule to the *EACCMA*.

47. The Appellant stated that the Respondent did not provide reasons as to why it disregarded the transaction value method set out under Paragraph 2(1) to the Fourth Schedule which the Appellant had demonstrated it adhered to.

48. That contrary to the Respondent's position, the Appellant submitted that the suppliers, Shenzen and Optiwella, through letters, informed the Respondent that the modems and STBs imported by the Appellant during the period August 2017 to August, 2019 were refurbished and not new.

49. That the Appellant avers that in asserting that the imported modems and STBs were not refurbished, the Respondent has failed to provide reasons for disputing the confirmation received from the suppliers.

50. That accordingly, it is the Appellant's contention that the price uplift on the imported modems and STBs was erroneous as the Respondent disregarded that the STBs and modems were refurbished and also the actual price paid by the Appellant upon importation as demonstrated by the various invoices and proof of payments provided by the Appellant contrary to the provisions of Section 122 of the *EACCMA*.

51. That in addition, the Appellant avers that under the Fourth Schedule to the *EACCMA*, customs value of imported goods are to be determined using one of the six methods of valuation which are to be applied sequentially. These methods are listed as follows;

    a. The Transaction Value Method - the primary method;

    b. The Transaction Value of Identical Goods Method - method 2

    c. The Transaction Value of Similar Goods Method - method 3

    d. The Deductive Value Method - method 4

    e. The Computed Value Method - method 5; and

    f. The Fall Back Value Method - method 6

52. That the conditions for use of the above valuation methods as stated under the Fourth Schedule and the East Africa Community Customs Valuation Manual are that:

    a. These methods, must be applied in sequence (that is Method 1 to Method 6);

    b. Method 1 must be attempted first. Method 2 can only be considered if a value cannot be determined under the first method;

    c. Methods 3 to Methods 6 to follow same procedure;

    d. Method 6 can only be applied if all the previous methods cannot be used; and

    e. The only exception is that the sequence of Methods 4 and 5 may be reversed at the request of the importer.

        1. That based on the above provisions of the Fourth Schedule, the Appellant avers that the transaction value method is the primary method of valuation. That the

second method that the Respondent would use to uplift the customs value is the transaction value of identical goods. Given that in this case, the modems and STBs were refurbished, it then follows the recourse for the Respondent should have been to refer to the transaction value of refurbished modems and STBs that are identical to the Appellant's STBs and modems (transaction value of identical goods). In the event that there were no identical refurbished STBs and modems being imported into Kenya, then the Respondent's recourse would have been to transaction value of similar refurbished STBs and modems and other sequentially methods on other valuation methods if the value could not be determined using this method.

2. That it is the Appellant's contention that the Respondent has erred in law and fact by using the price of new STBs and modems to uplift the Appellant's refurbished STBs and modems contrary to the provisions of the Fourth Schedule of *EACCMA*. The method applied by the Respondent is not any of the methods prescribed under Section 122 as read together with the Fourth Schedule to the *EACCMA*.

3. Accordingly, it is the Appellant's assertation that the Respondent should vacate its tax demand of Kshs 46,428,080.00 as it contravenes the provisions of Section 122 as read together with Paragraph 2(1) to the Fourth Schedule to the *EACCMA*.

b) The Respondent failed to consider the additional information and documents provided by the Appellant

56. The Appellant avers that it provided the Respondent with additional information and documents in its application for review dated February 11, 2021 which the Respondent failed to consider.

57. That the Appellant, through the application for review, confirmed to the Respondent that the suppliers Optiwella and Shenzen supplied refurbished STBs and modems to the Appellant during the period between August 2017 and August 2019.

58. That Appellant avers that the Respondent has failed to provide reasons for disputing the confirmations from the suppliers and claims that the letters are not valid because the Respondent was not in receipt of the same. The Appellant states that this is far from the truth and reiterates that these letters were again provided to the Respondent as Appendix 10 to the application for review.

59. That further, the Appellant avers that the Respondent is imposing unreasonable standards to these communications which have not been set out in law, with a view of justifying its disregard of the same.

60. That it is a fundamental principle of contract law that only the parties of a contract can rewrite the terms of their contract. This longstanding common law principle has been upheld by courts which have permitted parties to agree to whatever terms they wish provided they are not unlawful and to rely on their contractual terms in doing business. That this principle allows contracting parties to modify, cancel or otherwise alter the terms of a contract as they deem fit.

61. That further, the Respondent, as a third party to the contracts between the Appellant and its suppliers, should refrain from attempting to rewrite the contractual agreements between the Appellant and the suppliers as demonstrated by the supplier's confirmations and invoices issued by the suppliers.

62. That this claim by the Respondent seeks to rewrite the contractual obligations of the Appellant and its suppliers by forcing them to have engaged in a particular way to suit the Respondent which is contrary to freedom of contract. The Appellant submitted that under contract law, an agreement between two or more consenting parties is to be construed as it is as it demonstrates the intention and the mutual agreement of the parties and that a court of law should only interpret such intention. That the principle

was discussed in the case of *Osteria Ice Cream Limited v Junction Limited* (2011] eKLR where the Court observed that:

> " Only the parties themselves can rewrite their contract. The duty of the court is to interpret and enforce contracts entered into by the parties not to rewrite them..."

63. That the Respondent is prohibited from selecting an arbitrary value on which import duty is applicable, based on the express provisions of the *EACCMA* set out above. Based on the strict interpretation rule enunciated above, the Appellant submits that it was erroneous and presumptuous for the Respondent to subject a different customs value to import duty as opposed to the transaction value of the refurbished STBs and modems.

64. That it is not what the Respondent thinks that can determine the taxable value of the imported STBs and modems as it is only the law that stipulates the value and applicability of taxes in Kenya. The Appellant relied on the oft-cited case of *Scott v Russel (Inspector of Taxes TC 394 at page 424)* (1948] 2 All ER 1, where it was held that,

> "The subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him."

65. Further, the Appellant submitted that the Respondent was wrong to disregard the Appellant's agreement with its suppliers, albeit unwritten. The Appellant avers that the Respondent's arguments that the Appellant failed to provide renegotiated contracts is not sufficient to claim that no such agreement exist between the parties as non-written contracts are equally binding between parties. The Appellant relied on the case of *Bamburi Special Products Limited v Remax Construction Limited* [2018] eKLR where it was held by the High Court that oral as well as written contracts are fully enforceable in law and that the terms of oral contracts are inferred from the words or conduct of the parties of the contract. In that case, the High Court concluded that the Plaintiff and Defendant had been involved in a business relationship based on adduced evidence such as invoices, debit memos and various cheques which indicated payment of goods by one party to the other.

66. The Appellant submits that the Respondent was wrong not to consider the information provided by the suppliers in explaining the pricing difference between the new and refurbished STBs and modems and for basing its decision on the lack of written renegotiated contracts, which is against fundamental principles of Contract Law.

Appellant's Prayers.

67. The Appellant makes the following prayers:-

    a. That the tax demand for Kshs 46,428,080.00 by the Respondent's decision dated January 14, 2022 be vacated in its entirety;

    b. That a declaration be issued that the price uplift on the imported modems and STBs was erroneous as the Respondent disregarded the actual price paid by the Appellant contrary to the provisions of Section 122 as read together with the Fourth Schedule of the *EACCMA*;

    c. That the Appeal be allowed with costs to the Appellant; and

    d. Any other orders that the Tribunal may deem fit.

Respondent's Case

68. The Respondent's case is premised on the hereunder filed documents and proceedings before the Tribunal:-

    a. The Respondent's Statement of Facts dated March 31, 2022 and filed on the same date together with the documents attached thereto.

    b. The Respondent's written submissions dated August 5, 2022 and filed on the same date together with the legal authorities filed therewith.

        1. In the Statement of Facts the Respondent stated that the Appellant, for a long time had been making imports of particular items, specifically described as Set Top Boxes (STB) and technicolor modems for the use in its business of supply of cable television and internet services to its customers. That the Appellant would, during this period, declare the same for customs purposes valued as follows:

            a. Cost of STB being USD 28 per kit

            b. Cost of modem being USD 40.5 per kit

70. That for the period between 2018 and 2019, the Appellant, while declaring the imports for the similar goods used a reduced value per unit of the items as follows:

    a. Cost of a unit STB being USD 17 per kit

    b. Cost of a unit techno-color modem being USD 17 per modem

71. That accordingly, the Respondent issued a notice to carry out a post clearance audit on the Appellant pursuant to Sections 235 and 236 of *EACCMA* for the periods covering 2017-2019.

72. That upon the conclusion of the audit, the Respondent issued a demand notice dated November 29, 2019 amounting to Kshs 60,945,649.00 to the Appellant. That the basis of the demand was premised on the under declaration by the Appellant of its imported consignment as summarized below:

    a. Uplift of the unit price of the set -top boxes to $ 28 per kit: Kshs 13,698,936.00.

    b. Uplift of the unit price of the set -top boxes to $ 28 per kit for the year 2019: Kshs 3,887,962.00.

    c. Uplift of the unit price of technicolor modems to $ 40.5 per kit for the year 2018: Kshs 18,998,239.00

    d. Uplift of the unit price of technicolor modems to $ 40.5 per kit for the year 2019: Kshs 5,540,521.00.

    e. Undeclared items from Optiwella and Shenzen (suppliers): Kshs 11,561,444.00

        1. That the Appellant lodged an application for review vide a letter dated December 16, 2019 challenging the said demand.

        2. That both parties held a consultative meeting on 15th January, 2020 after which the Respondent through a letter dated January 17, 2020 sought additional information from the Appellant.

        3. That upon the conclusion of review of the documents/information provided, the Respondent, vide a letter dated 15th October, 2020 communicated its findings and

agreed to entirely vacate the demand for the year 2017 as well as the undeclared tax demand amounting to Kshs 11,561,44.00.

4. That the Respondent confirmed the tax demand of Kshs 43,145,660.00 as the information provided were not satisfactory to justify huge difference in pricing of the items during the periods in contention.

5. That the Appellant thereafter requested the dispute before resolved through

ADR and a meeting was held on 2nd November, 2022 wherein no consensus was arrived at on the dispute.

78. That the Respondent vide a letter dated January 22, 2021 confirmed and reiterated that the taxes amounting to Kshs 46,428,080.00 were due and payable having accrued interest and penalties during the intervening months.

79. That instead of making payment for the demanded amount and having foregone its right of appeal, the Appellant erroneously made an application for review on February 11, 2021 relating to the Respondent's letter dated January 22, 2021.

80. The Respondent however, vide a letter dated March 10, 2021 reiterated that its review decision was issued within the timelines allowed by law.

81. The Appellant thereafter proceeded to file a Notice and Memorandum of Appeal based on the Respondent's letter dated March 15, 2021.

82. That accordingly, the appeal was heard by the Tribunal and judgement delivered on December 15, 2021. That in the judgement, the Tribunal ordered the Respondent to issue a fresh review decision arising from the Appellant's letter (application for review) dated February 11, 2021 within 30 days from the date of the judgement.

83. The Respondent duly complied with the judgment and orders of the Tribunal, reviewed the application and rendered its decision on January 14, 2022, which is now the subject of the current appeal before the Tribunal.

84. That the review decision relates to the initial demand dated October 15, 2020 and as subsequently confirmed by a letter dated January 22, 2021 the amounts which comprises penalties and interest.

85. That the Appellant filed a Memorandum of Appeal and a Statement of Facts both on February 28, 2022 basing the Appeal on two issues namely that:-

a. The Respondent erred in fact and in law by uplifting the prices of imported modems and STBs contrary to the provisions of Section 122 as read together with the Fourth Schedule to the East Africa Community Customs and Management Act.

b. The Respondent erred in law and fact by failing to consider the additional information arid documents provided by the Appellant's application for review.

86. The Respondent reiterated its position as stated in its decision communicated to the Appellant on February 14, 2022.

87. The Respondent stated that it did not act in breach of parameters for the determination of the value and assessment of Import Duty as provided for under Section 122(1) of the *EACCMA* read together with the Fourth Schedule of the *Act*.

88. The Respondent did not apply the first method - the transaction value method under the Fourth Schedule of the *EACCMA* because the transaction value was in doubt. This is because the same (identical) goods had been previously been supplied to the Appellant at a higher price by the same suppliers and nothing justified the variance in prices during the period covered by the audit.

89. That the Respondent is not bound by the declaration and valuation method applied by the Appellant. Having doubted the transactional value of the imported items, the same could not be applied.

90. That Section 122 (44) of the *EACCMA* provides that

> "Nothing in the Fourth Schedule shall be construed as restricting or calling into question the rights of the proper officer to satisfy himself or herself as to the truth or accuracy of any statement, document or declaration presented for customs valuation purposes."

91. That the Appellant did not fully demonstrate the differences in form and appearance between new and allegedly refurbished STBs and Modems to warrant a huge difference in their pricing. The Respondent could not therefore apply the transactional value of the refurbished modems and STBs. The Appellant could not explain the reason for the change in the transactional value of the products imported except making a claim that the goods were refurbished, to which there is no evidence to that effect.

92. That in response to the alleged letter from the Appellant's supplies confirming the values of the imported items, the Respondent avers that it was not in receipt of the letters from Optiwella KFT and Shenzen Skyworth Digital Technology Co. Ltd as alleged by the Appellant. That further, the purported letters from the suppliers were not addressed to' the Respondent and that it is merely a statement not an agreement. That the Respondent cannot vouch on the authenticity of the said letters from the Appellant's suppliers.

93. The Respondent reiterated that what was needed from the Appellant were cogent evidence in the form of renegotiated contracts between the Appellant and its suppliers for the refurbished STBs and Modems. No doubt, in cross border or international commercial transactions, any variation of the price, design or nature of the goods subject to transaction between parties, needs to be followed by executed agreement outlining the new engagement terms between parties.

94. That to the contrary, the Appellant did not fully demonstrate that the STBs and Modems were indeed refurbished and the master supply and support agreement provided between the suppliers did not indicate the condition of the products supplied. The contracts between the Appellant, Shenzen Skyworth Digital Technologies and Optiwella KFT did not expressly indicate the product as being refurbished differences in form.

95. That in view of this, the second method of valuation - the transaction value of identical method was applied because the same (identical) goods had been previously been supplied at a higher price by the same suppliers.

96. That from the foregoing, it is evident that the assessed value of USD 28 per piece for the digital terrestrial receivers (Set-top boxes) and USD 40.5 per piece for technicolor TC7200 cable modems is valid and that the assessed amount of Kshs 46,428,080.00 is due and payable to the Respondent.

97. In submissions, the Respondent stated that the substance of the Appeal before the Tribunal is premised on the issue whether the Appellant demonstrated to the satisfaction of the Respondent that the huge price variance on the items previously imported and the once subject to the demand was as a result of the subsequent refurbishment of the items.

98. That the issue in dispute revolves first and importantly around the character of the items imported by the Appellant, which formed the basis of the demand, rather than the applicable valuation methodology. Once the question of character/ nature of the imported items is answered then the valuation easily falls into place.

99. That the issues for determination in this matter should be as follows:

    a. Whether the Appellant provided sufficient evidence to demonstrate that the goods imported were refurbished.

    b. Whether the Respondent applied the correct valuation methodology with respect to the goods imported subject to the demand

    a) Whether the Appellant provided sufficient evidence to demonstrate that the goods imported were refurbished.

100. The Respondent submitted that from the record and information placed before the Tribunal, it is clear that the Respondent, prior to making its review decision subject to appeal herein, granted the Appellant sufficient opportunity to challenge the basis upon which the demand is premised. That upon the Appellant lodging an application for review on December 16, 2019 the Tribunal should note that the application was considered and a thorough review undertaken by the Respondent demonstrated by various correspondences between the parties culminating into appealable decision communicated vide a letter dated January 14, 2022.

101. That the Respondent in its decision revised the initial demand from Kshs 60,945,649.00 to Kshs 43,145,660.00. That the reason why the demand for Kshs 43,145,660.00 was confirmed vide a letter dated January 14, 2022 was because the Appellant could not demonstrate huge variance on the drop of prices of the imported items on the basis that the same is refurbished. That several meetings were held and correspondences exchanged by parties to validate this position.

102. That in its letter dated February 14, 2020 the Appellant averred that the difference between the new and refurbished modems is demonstrated by among others warranty period, thermal usage of the modems, physical characteristics (scratches on the refurbished modems) and the packaging methodology. That other than the photos of packaging, no evidence was provided by the Appellant to the Respondent and even placed before the Tribunal to demonstrate differences in physical characteristics, thermal usage or warranty period of the refurbished items contradistinguished with the new items. That the Appellant made mere assertions rather than backing the same with providing samples of the items imported or warranty as claimed.

103. That the burden is on the Appellant to produce evidence to demonstrate the character/nature of the refurbished items as alleged by the Appellant. It is not enough to generally state so as an averment. That the High court in the case of *National Social Security Fund Board of Trustees v Commissioner of Domestic Taxes, Kenya Revenue Authority* (2016) eKLR affirmed as follows at paragraph 36:

> " There is a world of difference between assertion and proof. That which a party puts to be his case is an assertion. The party needs to adduce evidence to support his said assertion with a view to supporting his case"

104. Further, Madan J in his judgment in *CMC Aviation Ltd v Cruisair Ltd (1)* [1978] KLR 103 observed that:

> "Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of "evidence" as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth."

105. That proper identification of the character of the items imported, whether refurbished or otherwise is a material consideration before any valuation methodology is used. That this is because whatever valuation method applied as outlined under Section 122 of *EACCMA* read together with the Fourth Schedule of the Act, the law places an obligation on the Respondent to satisfy himself/ herself that the said declaration, statement or document is truthful or accurate for valuation purposes.

106. That it was incumbent upon the Appellant to demonstrate, by production of relevant evidence that the items in question are refurbished so as to satisfy the requirement of Section 122(4) of *EACCMA* aforestated.

107. That when Section 122(4) of *EACCMA* is applied, it is not mechanical exercise merely demonstrated by the prices paid for by parties to the transaction but the Respondent has to go beyond the invoices presented by the importer as to the nature of the imported goods, as long as there is a doubt on the nature of the items imported based on Appellant's previous declarations.

108. That there need not be any doubt in the mind of the Respondent as to the accuracy or truthfulness of the declaration made by the Appellant or documents presented to support the declaration. The documents, or statement provided in support thereof must satisfy the Respondent that the nature of particular goods imported for which declaration is made is accurate or truthful.

109. That whereas it appears from the wording of Section 122(4) that the satisfaction required of the Respondent as to the accuracy or truthfulness of the declaration is subjective, it however originates from known objective parameters and not the subjective application of mind of the Respondent.

110. That from record and pleadings of the parties herein, it is clear that the Appellant has been engaged in long term business transactions with its suppliers. These suppliers remained unchanged over time even during the period covered by the demand and the goods imported by the Appellant during the period was valued as per Paragraph 4 of the Respondent's Statement of Facts.

111. That it is not in dispute that the business relationship between the Appellant and the suppliers was modelled through existence of written contracts. That the Tribunal should note that there existed agreements between the Appellant and one of its supplier Shenzen Skyworth Digital Technology Co. Ltd. The Agreement guided the business processes between the Appellant and the supplier on new modems and Set Top Boxes prior to the change of products on what the Appellant now describes as refurbished items.

112. That arising from these known parameters, past practices and manner of engagement, the supply of other identical items with a huge variation of the prices which the Appellant states as refurbished, needs to be accompanied by renegotiated contracts and further a proper demonstration that the items were refurbished as alleged by the Appellant in its dated February 14, 2020.

113. That at no point did the Appellant prove that the items were refurbished and the Respondent needed a further layer of assurance by requiring the Appellant to produce renegotiated contracts demonstrating that the nature of the products supplies has since changed from new to refurbished status. However, the Appellant failed to provide the information requested.

114. That the Appellant has not demonstrated what hardship or prejudice it will face if the renegotiated contracts is produced save only to state that a contract need not be in writing. This is wrong way of rebutting the Respondent's need for information particularly taking note that in the initial transactions and importation done by the Appellant with the same suppliers, the Appellant in fact had master agreement which was used to justify the valuation and nature of items. The burden shifts on the Appellant to demonstrate why production of the required information is such an onerous burden on their part.

115. That in an attempt to justify that the items were refurbished, the Appellant produced two documents allegedly from its suppliers annexed at Appendix 10 of its Statement of Facts. They included a letter from Optiwella and a further statement from Shenzen Skyworth Digital. That the two documents themselves do not address the accuracy or truthfulness on the nature of the items declared by the Appellant.

116. That the statement by Shenzen Skyworth Digital Technology Co. Ltd was not addressed to the Respondent and it is not clear who the intended recipient of the statement is. That the same statement does not in any way state that the items are refurbished as contended by the Appellant. The same has no probative value in so far as evidential threshold of nature of the items is concerned.

117. That further, the statement from Optiwella, even though it referenced the Respondent to be the intended recipient, at no point was the said letter ever received by the Respondent from the Appellant's supplier. Even if the said letter could have been received by the Appellant themselves for onward forwarding to the Respondent, no evidence of forwarding mail was placed before the Respondent or before Tribunal to demonstrate that the said letter originated from the Appellant's supplier.

118. That it is clear that there is no evidence to prove that the products imported by the Appellant related to refurbished items to justify huge variation of its prices. The burden squarely falls on the Appellant to satisfy the Respondent that the documentations, statements, information or declarations made are accurate and truthful for valuation purposes pursuant to section 122(4) of *EACCMA*. The Appellant failed to discharge this burden.

119. The Respondent asked the Tribunal to rely on the following cases:

    i. *Commissioner of Domestic Taxes v Galaxy Tools Ltd* (2021) eKLR(Income Tax Appeal No. E 088 of 2020)

    ii. *Osho Drapers Limited v Commissioner of Domestic Taxes* [2022] e KLR(income Tax Appeal No. E 147 of 2020)

    iii. *Kenya Revenue Authority v Man Diesel & Turbo Se, Kenya* [2021] eKLR

Respondent's Prayers

120. The Respondent prays that the Tribunal:

    a. Upholds the Respondent's assessment of Kshs 46,428,080.00 as proper and in conformity with the provisions of the Law.

    b. Dismisses this Appeal as it is devoid of any merit

Issues For Determination

121. The Tribunal has carefully studied the pleadings and documentation together with the submissions of both parties and is of the respectful view that the issues for its determination are as follows:-

    a. Whether the Appellant provided sufficient evidence to demonstrate that the goods imported were refurbished.

    b. Whether the Respondent erred in law and in fact by uplifting the prices of imported modems and STBS contrary to the provisions of Section 122 as read together with the Fourth Schedule to the *EACCMA*.

Analysis And Findings

a.Whether the Appellant provided sufficient evidence to demonstrate that the goods imported were refurbished.

122. The dispute arose from a post clearance audit conducted by the Respondent pursuant to a notice dated July 16, 2019 and subsequent demand dated November 29, 2019. The Appellant lodged an application for review vide a letter dated December 16, 2019. After various correspondences and meetings, the Respondent issued a review decision on January 17, 2020.

123. The Appellant lodged an appeal (TAT No 147 of 2021). That Appeal was heard and the judgement of the Tribunal delivered on December 15, 2021. The Tribunal ordered the Respondent to issue a fresh review decision. The Respondent issued a further review decision on January 14, 2022. That decision is now the subject of the current appeal.

124. The Tribunal notes that the Appellant had done business with the suppliers over a long time. This business was based on contracts between the parties. The Appellant submitted that in an effort to reduce costs to its customers, it decided to import refurbished rather than new items. This shift from new to refurbished items is however not supported by the documentation filed at the Tribunal.

125. The Appellant submitted that it provided letters from its suppliers indicating that the items were refurbished. The Respondent on the other hand submitted that the said letters were not addressed to them and therefore they could not rely on them. The said letters were not produced by any of the parties during the hearing.

126. The Appellant's documentation filed at the Tribunal does not indicate that the items imported by the Appellant were refurbished. Indeed, all that it would have taken for the Appellant and its suppliers would have been to amend the documentation (agreements, quotations, invoices, shipping documents and customs clearance forms), to indicate that the imported items were refurbished.

    It is curious that such a fundamental shift in the quality and price of the items to be supplied was not captured in the documents between the Appellant and its suppliers.

127. The Respondent submitted that the Appellant had the burden to produce evidence to demonstrate the character/nature of the refurbished items as alleged. The Respondent relied on the High court

ruling in the case of *National Social Security Fund Board of Trustees v Commissioner of Domestic Taxes, Kenya Revenue Authority* (2016) eKLR at paragraph 36 where it was held:

> " There is a world of difference between assertion and proof. That which a party puts to be his case is an assertion. The party needs to adduce evidence to support his said assertion with a view to supporting his case"

128. The Respondent also relied on the Judgement of Madan J in his judgment in *CMC Aviation Ltd v Cruisair Ltd (1)* [1978] KLR 103 where it was observed that:

> " Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of "evidence" as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth"

129. The burden of proving that the demand issued by the Respondent is incorrect or excessive lies with the Appellant. Section 30 of the *Tax Appeals Tribunal Act* provides that: -

> " In a proceeding before the Tribunal, the Appellant has the burden of proving-
>
> a. where an appeal relates to an assessment, that the assessment is excessive. or
>
> b. in any other case, that the tax decision should not have been made or should have been made differently."

130. The Tribunal relies on the Judgement in TAT 55 of 2018 *Boleyn International Ltd v Commissioner of Domestic Taxes* where it was held that;

> " 34 .....we find that the Appellant at all times bore the burden of proving that the Respondent's decision and investigations were wrong. The Tribunal is guided by the provisions of Section 56 (1) of the *Tax Procedures Act* which states as follows:
>
> > "In any proceedings under this Part, the burden shall be on the taxpayer to prove that a tax decision is incorrect."

131. The Appellant submitted that the items it imported were refurbished, but gave no evidence to support its contention. The Tribunal therefore finds that the Appellant has not discharged its burden of proving that the imported items were refurbished.

b.Whether the Respondent erred in law and in fact by uplifting the prices of imported modems and STBS contrary to the provisions of Section 122 as read together with the Fourth Schedule to the EACCMA.

132. The Appellant submitted that the Respondent, in uplifting the customs value of the modems and STBS, acted in breach of the mandatory statutory regime and parameters of the assessment of import duty as provided for under Section 122(1) of the *EACCMA* as read together with Paragraph 2(1) of the Fourth Schedule to the *EACCMA*. These provisions state the following:

a. Section 122 of the *EACCMA* provides that,

> "Where imported goods are liable to import duty ad valorem, then the value of such goods shall be determined in accordance with the Fourth Schedule and import duty shall be paid on that value."

b. Flowing from the above, Paragraph 2(1) of the Fourth Schedule to the *EACCMA* states that, "The customs value of imported goods shall be the transaction value, which is the price actually paid or payable for the goods when sold for export to the Partner State..."

133. The Appellant further submitted that as evidenced by the invoices and purchase orders provided to the Respondent, it procured the refurbished STBs and modems at the cost of USD 17 per kit and USD 17 per unit, respectively and that this is the price that was actually paid for these items, hence their transaction value. The Appellant affirms that this was the correct value of the goods pursuant to the earlier mentioned Paragraph 2(1) of the Fourth Schedule.

134. On the other hand, the Respondent submitted that whereas the transactional value method is first in the hierarchy of valuation methodologies, this does not prevent the Respondent from departing. The Respondent submitted that there was a doubt of the transaction value based on previous identical imports by the Appellant.

135. Consequently, the second valuation method was used. The Respondent's submission was that the sequence exists for a reason where the Respondent is dissatisfied with the transactional value method, the Respondent may with reasonable cause depart from the use of Transactional Value Method. That was the case in this matter.

136. The Respondent submitted that having found that the Appellant could not demonstrate that the items imported were refurbished, the Appellant could not satisfy the Respondent that ridiculously low value of the imported items were as a result of them being refurbished. The value of the imported modems and STB was distinctively low compared to the ordinary competitive price of modems and STB that the Appellant had previously imported from the same suppliers. Having declared identical items from the same suppliers, the Respondent departed from the transactional value and applied the value of the identical items as initially imported and declared by the Appellant.

137. Part I of the Fourth Schedule of *EACCMA* defines identical goods to mean:

> "Goods which are same in all respects, including physical characteristics, quality and reputation. Minor differences in appearance shall not preclude goods otherwise conforming to the definition from being regarded as identical"

138. Section 122 (44) of the *EACCMA* provides that

> " Nothing in the Fourth Schedule shall be construed as restricting or calling into question the rights of the proper officer to satisfy himself or herself as to the truth or accuracy of any statement, document or declaration presented for customs valuation purposes."

139. The Tribunal had the opportunity to handle a similar matter in which the Respondent departed from the transaction method in carrying out the valuation of imported goods. In TAT 119 of 2018 (*Auto*

Express Limited v Commissioner of Customs & Boarder Control), the Tribunal in paragraphs 64 to 66 stated as follows:-

> " 64. In this regard, the Respondent has relied on Section 122(4) of the *EACCMA* which gives a customs officer the right to satisfy themselves as to the truth or accuracy of any statement, document or declaration. This position is also supported by Article 17 (Text 1.1) of the Agreement on Implementation of Article Vii of the General Agreement on Tariffs and Trade (GATT) 1994 (also known as the WTO Customs Valuation Agreement).
>
> 65. The Tribunal however notes Text 1.2 of Article 17 of the WTO Customs Valuation Agreement recommends that certain procedures should be observed in such instances.
>
> Text 1.2 - "Decision regarding cases where Customs Administrations have reasons to doubt the truth or accuracy of the declared value" - not only re affirms that the transaction value is the primary basis of valuation, but recommends that, as a first step, Customs should ask the importer to provide further explanation that the declared value represents the total amount actually paid or payable for the imported goods. If reasonable doubt still exists after receiving additional information (or in absence of a response), Customs may decide that the value cannot be determined according to the transaction value method. However, before a final decision is taken, Customs must communicate its reasoning to the importer, who, in turn, must be given reasonable time to respond. In addition, the reasoning of the final decision must be communicated to the importer in writing.
>
> 66. At its meeting of May 12, 1995, the Committee on Customs Valuation adopted the following decision:
>
> > "When a declaration has been presented and where the customs administration has reason to doubt the truth or accuracy of the particulars or of documents produced in support of this declaration, the customs administration may ask the importer to provide further explanation, including documents or other evidence, that the declared value represents the total amount actually paid or payable for the imported goods, adjusted in accordance with the provisions of Article 8.
> >
> > If, after receiving further information, or in the absence of a response, the customs administration still has reasonable doubts about the truth or accuracy of the declared value, it may, bearing in mind the provisions of Article 11, be deemed that the customs value of the imported goods cannot be determined under the provisions of Article 1.
> >
> > Before taking a final decision, the customs administration shall communicate to the importer, in writing if requested, its grounds for doubting the truth or accuracy of the particulars or documents produced and the importer shall be given a reasonable opportunity to respond When a final decision is made, the customs

administration shall communicate to the importer in writing its decision and the grounds therefor."

140. From the pleadings and the documents filed at the Tribunal, the Respondent gave the Appellant the opportunity to demonstrate, by production of relevant evidence that the items in question were refurbished so as to satisfy the requirement of Section 122(4) of *EACCMA*. The parties engaged over a long period. Indeed the dispute even went through the ADR process.

141. The burden of proving that the imported items were refurbished lay with the Appellant. It is only after the inability of the Appellant to prove that the items were refurbished that the Respondent used method 2 in determining the value of the goods.

142. Having found that the Appellant did not discharge the burden of proving that the imported items were refurbished, the Tribunal finds that the Respondent did not err in law and in fact in uplifting the prices of the modems and STBS imported by the Appellant.

Final Decision

143. The upshot of the foregoing analysis is that the appeal is not merited and the tribunal accordingly proceeds to make the following orders: -

a. The appeal be and is hereby dismissed.

b. The respondent's objection decision dated January 14, 2022 be and is hereby upheld.

c. Each party to bear its own costs.

144. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH 2023

.....

ERIC N. WAFULA,

CHAIRMAN

.....

CYNTHIA B. MAYAKA,

MEMBER

.....

GRACE MUKUHA,

MEMBER

.....

JEPHTHAH NJAGI,

MEMBER

.....

ABRAHAM K. KIPROTICH,

MEMBER